# Official Assignee of the estate of Koh Liang Hee (a bankrupt) v Koh Thong Chuan & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S5-22-290-1995
JAMES FOONG J
12 MARCH 1997

***Bankruptcy*** *— Act of bankruptcy — Fraudulent conveyance — Conveyance before bankruptcy — Whether transfer was a fraudulent conveyance constituting an act of bankruptcy — Doctrine of relation back — Actual date of such conveyance — Whether fraudulent conveyance took place on date of execution of purported sale and purchase agreement or date of registration of transferee on register of land title as proprietor — Bankruptcy Act 1967 ss 3(1)(b) & 47*

***Bankruptcy*** *— Voluntary settlement — Fraudulent conveyance — Father transferred property to son under a purported sale and purchase agreement — Whether bona fide sale — Whether transfer a voluntary settlement which was void against the Official Assignee — Bankruptcy Act 1967 s 52(1)*

***Evidence*** *— Burden of proof — Fraud alleged in civil case — Allegation of fraud affecting indefeasibility of title to land — Standard of proof — Whether standard of proof is beyond reasonable doubt*

***Land Law*** *— Indefeasibility of title and interests — Determination of title by operation of law — Transfer of land declared void under bankruptcy law — Whether title of subsequent chargee may be defeated — National Land Code 1965 s 340(4)*

***Words and Phrases*** *— 'Determination' — National Land Code 1965 s 340(4)*

The plaintiff was the Official Assignee of one Koh Liang Hee (a bankrupt) ('the father'). The plaintiff sought from the court various declaratory orders relating to the Bankruptcy Act 1967 ('the Act') with consequential orders. The father, his three sons and brothers acted as guarantors for four private limited companies that he controlled which enjoyed financial facilities in the form of loans from United Malayan Banking Corp ('UMBC'). These companies defaulted in their loans and legal actions were commenced against the companies as well as the guarantors by UMBC. Judgments were obtained against the guarantors and on 15 May 1991, a bankruptcy notice was presented by UMBC against the father for failing to satisfy one of the judgments. This was followed by a creditor's petition presented on 15 August 1991 and by 3 July 1992, adjudicating and receiving orders were made against him. The father remained an undischarged bankrupt until his death in 1994. It was discovered, however, that the father had conveyed a piece of property ('the property') to his youngest son, the first defendant, in consequence of a written sale and purchase agreement dated 22 September 1990 for RM1m. The property was at the material time charged to D & C Bank with a redemption sum due at RM1,109,732. To finance this purchase, the first defendant raised a sum of RM960,000 from the Standard Chartered Bank ('Stand-Chart') and since this was

insufficient to pay off the redemption sum, he topped up the difference with his own funds. By 26 March 1991, the name of the first defendant was registered as proprietor of the property. In September 1993, wishing to raise further funds, the first defendant borrowed from the second defendant, a finance company, a sum of RM1,575,000 and as security, the property was charged to the second defendant by way of two legal charges. The plaintiff claimed, inter alia, for declarations that: (i) the transfer from the father to the first defendant was void under ss 47 and/or 52 of the Act; (ii) the charges created in favour of the second defendant were void under s 53B of the Act; (iii) the property was deemed to be the property of the plaintiff under s 53B(1) of the Act; (iv) alternatively, the first defendant held the property as a constructive trustee for the benefit of the plaintiff; (v) the plaintiff was entitled to recover the property free from the second defendant's charges by virtue of ss 47 and 53B of the Act and s 340(4) of the National Land Code 1965 ('the NLC 1965'); and (vi) the defendants within 14 days do deliver the document of title of the property free from the second defendant's charges, failing which the senior assistant registrar of the High Court should execute all relevant documents to transfer the property free from encumbrances to the plaintiff. The issue for determination was whether the transfer by the father to the first defendant was fraudulent. There were, however, two preliminary issues, namely: (i) the standard of proof on the allegation of fraud; and (ii) the date when the alleged act of bankruptcy by way of fraudulent conveyance occurred.

**Held**, making declarations in favour of the plaintiff:

(1) In this case, the allegation of a fraudulent conveyance was founded on the law of bankruptcy, which was a civil matter. This had no connection with any criminal conduct or offence because the entire claim by its nature and the law applicable was civil in substance. The civil burden of proof based on the balance of probabilites was therefore applicable (see p 147C–D); *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 followed; *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 not followed.

(2) 'Fraudulent conveyance' under s 3(1)(b) of the Act connoted a positive action rather than the instrument of transfer of a property, or the document which evidenced an agreement to transfer. It referred to an act of transfer where the title of the property of a person would by law be considered passed from one to another. The transfer of the property to the first defendant took place on 26 March 1991 and this was well within the period of six months preceding the date of the presentation of the bankruptcy petition against the father which was on 15 August 1991. The alleged fraudulent conveyance therefore could still be considered for relation back under s 47 of the Act (see pp 147G–I and 148A); *Lian Keow Sdn Bhd (In liquidation) v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 followed.

(3) Based on the facts and circumstances of the case and the conditions which the father and his family were in at the time, it was probable that the father transferred the property to the first defendant to ensure its safety from an impending financial disaster. The transfer of the property from the father to the first defendant therefore was a fraudulent conveyance constituting an act of bankruptcy within s 3(1)(b) of the Act and was therefore void (see p 150B–C); *Re Khor Bak Kee* [1936] MLJ 5 and *Re Yeow Heap Seng* [1965] 2 MLJ 67 followed.

(4) Section 349(3) of the NLC 1965 and s 24 of the Act could co-exist and complement each other. Section 24(4) of the Act vested upon the Official Assignee the bankrupt's property upon bankruptcy. When it involved land, registration of his interest under s 349 of the NLC 1965 became necessary for the purpose of dealing with the land. In between this period of registering his interest with the Registrar of Land Titles and after he was vested with the bankrupt's property under s 24(4) of the Act, the land was vested in him in equity (see p 152A–B); *Re Kwan Chew Shen t/a Sykt Kaaf* [1987] 1 CLJ 314 followed.

(5) Since the conveyance between the father and the first defendant was fraudulent and therefore void, the title of the first defendant in the property had determined. When it determined, the concept of indefeasibility no longer applied by virtue of s 340(4) of the NLC 1965, and since it determined by reason of the transfer being void, it related back to the time of the transfer. This meant that the first defendant had no title at any time to the property. Since the first defendant had no title to the property, he could not have created the legal charges in favour of the second defendant since the legal charges subsisted on the strength of the first defendant's claim to the title. They too had no protection of indefeasibility offered under s 340(1) of the NLC 1965 (see pp 153I and 154A–B).

(6) The whole transaction was a settlement by the father to the first defendant. No consideration passed and the loan obtained from Stand-Chart was to substitute that of D & C Bank. The difference between the redemption sum and the loan from Stand-Chart was probably paid by the father. Judging the evidence in its entirety, the objective of this settlement was to safeguard the property because it was worth more than the sum due to D & C Bank. The plaintiff therefore succeeded in their alternative claim that the property was a settlement within the period stipulated in s 52(1) of the Act and thus the transfer to the first defendant was void (see p 155B–D).

(7) The fraudulent conveyance from the father to the first defendant was at the date of the registration of the transfer. At that particular point of time, ie the exact moment when the name of the first defendant was inserted onto the register of title, the property must have been free of the D & C Bank charge, otherwise the

transfer could not have been effected and it must be deemed that the father had secured such a discharge. Under such circumstances the plaintiff was entitled to take the property free from all encumbrances (see p 155G–I).

**Per curiam**:

The word 'determination' used in s 340(4) of the NLC 1965 must connote the legal meaning of 'the cessation of an estate or interest' (see p 153H).

**[Bahasa Malaysia summary**

Plaintif adalah Pegawai Pemegang Harta seorang bernama Koh Liang Hee (seorang bankrap) ('si bapa'). Plaintif telah memohon dari mahkamah ini pelbagai perintah perisytiharan yang berkaitan dengan Akta Kebankrapan 1967 ('Akta tersebut') dengan perintah-perintah berbangkit. Si bapa, tiga orang anak lelaki dan adik-beradiknya telah bertindak sebagai penggerenti untuk empat syarikat persendirian berhad yang dikawalnya yang menikmati kemudahan kewangan dalam bentuk pinjaman dari United Malayan Banking Corp ('UMBC'). Syarikat-syarikat tersebut telah ingkar dalam pinjaman-pinjaman mereka dan tindakan undang-undang telah diambil terhadap syarikat-syarikat tersebut serta penggerenti mereka oleh UMBC. Penghakiman telah diperolehi terhadap penggerenti dan pada 15 Mei 1991, satu notis kebankrapan telah diserahkan oleh UMBC ke atas si bapa kerana gagal memuaskan salah satu daripada penghakiman tersebut. Ini diikuti oleh satu petisyen pemiutang yang diserahkan pada 15 Ogos 1991 dan pada 3 Julai 1992, perintah-perintah penghukuman dan penerimaan dibuat terhadapnya. Si bapa kekal seorang bankrap yang tidak dilepaskan sehingga kematiannya pada tahun 1994. Walau bagaimanapun, telah didapati bahawa bapa tersebut telah memindahmilik sebidang harta tanah ('harta tersebut') kepada anak lelaki bongsunya, defendan pertama, akibat satu perjanjian jual-beli bertulis bertarikh 22 September 1990 untuk harga RM1 juta. Harta tersebut, pada masa itu, telah digadaikan kepada D & C Bank dengan jumlah penebusan sebanyak RM1,109,732. Untuk membiayai pembelian, defendan pertama telah mendapatkan sejumlah RM960,000 daripada Standard Chartered Bank ('Stand-Chart') dan oleh kerana ini tidak mencukupi, defendan pertama telah menggunakan wang sendiri untuk membiayai baki jumlah penebusan. Pada 26 Mac 1991, nama defendan pertama telah didaftarkan sebagai tuan punya harta tersebut. Dalam bulan September 1993, untuk menambahkan wang, defendan pertama telah meminjam dari defendan kedua, sebuah syarikat kewangan, wang sejumlah RM1,575,000 dan sebagai cagarannya, harta tersebut telah digadaikan kepada defendan kedua dengan dua gadaian. Plaintif telah memohon, antara lainnya, untuk perisytiharan bahawa: (i) pindahmilik dari si bapa kepada defendan pertama adalah tidak sah di bawah ss 47 dan/atau 52 Akta tersebut; (ii) gadaian-gadaian yang diwujudkan untuk

defendan kedua adalah tidak sah di bawah s 53B(1) Akta tersebut; (iii) harta tersebut adalah dianggap sebagai harta plaintif di bawah s 53B Akta tersebut; (iv) sebagai alternatif, defendan pertama memegang harta tersebut sebagai pemegang amanah konstruktif bagi manfaat plaintif; (v) plaintif berhak mendapat kembali harta tersebut bebas daripada gadaian-gadaian defendan kedua mengikut ss 47 dan 53B Akta tersebut dan s 340(4) Kanun Tanah Negara 1965 ('KTN 1965'); dan (vi) defendan-defendan mesti menghantar-serahkan, dalam masa 14 hari, dokumen hakmilik harta tersebut bebas daripada gadaian-gadaian defendan kedua, dan jikalau gagal, penolong kanan pendaftar Mahkamah Tinggi akan melaksanakan segala dokumen yang relevan untuk memindahmilik harta tersebut bebas daripada sebarang bebanan kepada plaintif. Isu untuk diputuskan adalah sama ada pindahmilik oleh si bapa kepada defendan pertama merupakan fraud. Bagaimanapun, terdapat dua isu permulaan, iaitu (i) darjah pembuktian atas pengataan fraud; dan (ii) tarikh berlakunya perbuatan kebankrapan yang dikatakan, melalui pemindahhakan fraud.

**Diputuskan**, memberikan deklarasi memihak plaintif:

(1) Dalam kes ini, pengataan pemindahhakan fraud adalah berasaskan undang-undang kebankrapan yang merupakan perkara sivil. Ianya tidak berkaitan dengan kelakuan atau kesalahan jenayah kerana keseluruhan tuntutan tersebut mengikut sifatnya dan undang-undang yang terpakai adalah bersifat sivil. Oleh itu, darjah pembuktian sivil berdasarkan imbangan kebarangkalian adalah terpakai (lihat ms 147C–D); *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 diikut; *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 tidak diikut.

(2) 'Pemindahhakan fraud' di bawah s 3(1)(b) Akta tersebut menunjukkan tindakan yang positif dan bukan instrumen pindahmilik harta, ataupun dokumen yang membuktikan perjanjian untuk pindahmilik. Ianya merujuk kepada tindakan memindahmilik di mana hakmilik harta seseorang akan dianggap oleh undang-undang telah dialihkan kepada seorang yang lain. Pindahmilik harta tersebut kepada defendan pertama telah berlaku pada 26 Mac 1991 dan ini adalah di dalam jangkamasa enam bulan sebelum tarikh pengemukaan petisyen kebankrapan terhadap si bapa yang berlaku pada 15 Ogos 1991. Oleh itu, pemindahhakan fraud yang dikatakan masih boleh dipertimbangkan untuk hubungan balik di bawah s 47 Akta tersebut (lihat ms 147G–I dan 148A); *Lian Keow Sdn Bhd (In liquidation) v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 diikut.

(3) Berdasarkan fakta-fakta dan keadaan kes ini dan keadaan si bapa dan keluarganya pada masa itu, adalah berkemungkinan bahawa si bapa telah memindahmilik harta tersebut kepada defendan pertama untuk memastikan bahawa ianya terselamat daripada bencana kewangan yang akan menimpa. Maka pindahmilik harta tersebut daripada si bapa kepada defendan pertama adalah satu

pemindahhakan fraud yang merupakan suatu perbuatan kebankrapan di bawah s 3(1)(b) Akta tersebut dan oleh itu ianya adalah terbatal (lihat ms 150B–C); *Re Khor Bak Kee* [1936] MLJ 5 dan *Re Yeow Heap Seng* [1965] 2 MLJ 67 diikut.

(4) Seksyen 349(3) KTN 1965 dan s 24 Akta tersebut boleh wujud bersama dan melengkapi satu sama lain. Seksyen 24(4) Akta tersebut meletakhak harta si bankrap ketika berlakunya kebankrapan ke atas Pegawai Pemegang Harta. Apabila ianya melibatkan tanah, pendaftaran kepentingannya di bawah s 349 KTN 1965 menjadi suatu kemestian untuk tujuan urusan mengenai tanah itu. Di antara jangkamasa mendaftarkan kepentingannya dengan Pendaftar Hakmilik Tanah dan setelah dia diletakhak dengan harta si bankrap di bawah s 24(4) Akta tersebut, tanah itu adalah terletakhak ke atasnya dalam ekuiti (lihat ms 152A–B); *Re Kwan Chew Shen t/a Sykt Kaaf* [1987] 1 CLJ 314 diikut.

(5) Memandangkan pemindahhakan antara si bapa dan defendan pertama adalah satu fraud dan terbatal, maka hakmilik defendan pertama ke atas harta tersebut telah ditamatkan. Apabila hakmilik itu ditamatkan, konsep ketakbolehan disangkal tidak lagi terpakai menurut s 340(4) KTN 1965, dan oleh kerana ianya ditamatkan kerana ketaksahan pindahmilik tersebut, ia telah berhubung balik kepada masa pindahmilik tersebut. Ini bermakna bahawa defendan pertama tidak mempunyai hakmilik ke atas harta tersebut pada bila-bila masa pun. Oleh kerana defendan pertama tidak mempunyai hak milik ke atas harta tersebut, dia tidak boleh mewujudkan gadaian sah yang memihak kepada defendan kedua kerana gadaian-gadaian tersebut telah wujud berdasarkan kekukuhan tuntutan defendan pertama ke atas hakmilik tersebut. Gadaian-gadaian tersebut juga tidak dilindungi oleh ketakbolehan disangkal di bawah s 340(1) KTN 1965 (lihat ms 153I dan 154A–B).

(6) Keseluruhan transaksi tersebut merupakan satu 'settlement' oleh si bapa kepada defendan pertama. Tiada balasan yang dipindahkan dan pinjaman yang diperolehi daripada Stand-Chart adalah untuk menggantikan pinjaman dari D & C Bank. Perbezaan antara wang penebusan dan pinjaman daripada Stand-Chart mungkin telah dibayar oleh si bapa. Menilaikan keterangan secara keseluruhannya, objek 'settlement' tersebut adalah untuk menyelamatkan harta tersebut kerana ianya bernilai lebih daripada jumlah yang terhutang dengan D & C Bank. Maka plaintif berjaya dalam tuntutan alternatifnya bahawa harta tersebut adalah suatu 'settlement' dalam jangkamasa yang dinyatakan di bawah s 52(1) Akta tersebut dan pindahmilik kepada defendan pertama adalah tidak sah (lihat ms 155B–D).

(7) Pemindahhakan fraud berlaku pada tarikh pendaftaran pindahmilik tersebut. Pada masa yang tertentu itu, iaitu pada masa nama defendan pertama dimasukkan dalam daftar hakmilik, harta tersebut mestilah sudah bebas daripada gadaian dengan

D & C Bank, kalau tidak pindahmilik tersebut tidak boleh dilaksanakan dan haruslah dianggap bahawa si bapa telah mendapatkan penebusan tersebut. Di dalam keadaan sedemikian, plaintif berhak mendapatkan harta tersebut bebas daripada sebarang bebanan (lihat ms 155G–I).

**Per curiam**:

Perkataan 'penamatan' yang digunakan dalam s 340(4) KTN 1965 mesti menunjukkan maksud undang-undang 'pemberhentian satu estet atau kepentingan' (lihat ms 153H).]

**Notes**

For a case on indefeasibility of title and interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1868.

For cases on fraudulent conveyances and the doctrine of relation back, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1647–1649.

For cases on the quantum of proof on the allegation of fraud in civil cases, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 286–298.

**Cases referred to**

*A Gunsbourg & Co Ltd, Re* [1920] All ER Rep 492 (refd)
*Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 (folld)
*Dombrowski, in Re Trustee* (1923) 92 LR Ch 415 (refd)
*Khor Bak Kee, Re* [1936] MLJ 5 (folld)
*Krishnadas a/l Achutan Nair v Maniyam a/l Samykano* [1997] 1 MLJ 94 (refd)
*Kwan Chew Shen t/a Sykt Kaaf, Re* [1987] 1 CLJ 314 (folld)
*Lian Keow Sdn Bhd (In liquidation) v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 (folld)
*M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 (not folld)
*Pumfrey, Re, ex p Hillman* (1878) 10 Ch D 622 (refd)
*Yeow Heap Seng, Re* [1965] 2 MLJ 67 (folld)

**Legislation referred to**

Bankruptcy Act 1967 ss 2, 3(1)(b), 3(1)(i), 24(4), 47(1), 52, 53B, 53B(2)
National Land Code 1965 ss 340(1), 340(2), 340(3), 340(4), 349(3)

*T Thomas* (*YT Yew* with him) (*Skrine & Co*) for the plaintiff.
*Noorin bte Badaruddin* (Senior Federal Counsel).
*A Muker* (*Lovelace & Hastings*) for the first defendant.
*D Goon* (*SY Ng* with him) (*Raja Darryl & Loh*) for the second defendant.

**James Foong J**:

*Background*

The plaintiff is the Official Assignee of the estate of one Koh Liang Hee, a bankrupt ('the father'). The plaintiff is seeking from this court various

declaratory orders relating to the Bankruptcy Act 1967 ('the Act') with consequential orders on which I shall elaborate in greater detail later. In order to fully understand the nature of the plaintiff's claim, it is necessary at the outset to briefly outline the facts.

The father at one time controlled four private limited companies by such names as Kwang Hap Siang Sdn Bhd, Leadcom Sdn Bhd, Taman Batu Battery Sdn Bhd and Precistone Sdn Bhd. The shareholders of these companies were the father himself, his four sons and his brothers. In the course of its business, these four companies enjoyed financial facilities in the form of loans from the United Malayan Banking Corp ('UMBC'). As securities for these loans, the father, three of his sons and brothers were guarantors. In the mid-1980s these four companies defaulted in their loan repayments to UMBC resulting in legal actions being commenced by UMBC against the companies as well as their guarantors. These suits were filed in November 1987 and April 1988. Judgments against the father as one of the guarantors were obtained in 1989. On 15 May 1991, a bankruptcy notice was presented by UMBC against the father for failing to satisfy one of the judgments. This was soon followed by a creditor's petition presented on 15 August 1991 which was personally served on the father on 25 October 1991. By 3 July 1992, adjudicating and receiving orders were made against him. He remained an undischarged bankrupt until his death in 1994.

After the father was adjudicated a bankrupt, the Official Assignee, from information received, realized that the father had conveyed a piece of landed property held under Grant No 12472, Lot 94, Section 43, District of Kuala Lumpur — on which is a bungalow house with a civic address of No 25, Jalan Yap Kwan Seng, Kuala Lumpur ('the property') — to his youngest son, the first defendant. It was consequent to a purported written sale and purchase agreement entered into between the first defendant and the father on 22 September 1990 to sell the property at a declared purchase price of RM1m. A sum of RM100,000 was acknowledged to be paid by the first defendant to the father as deposit and initial part payment. The property was at that material time charged to Development & Commercial Bank ('D & C Bank') with a redemption sum due at RM1,109,732. To finance this purchase, the first defendant raised a sum of RM960,000 from the Standard Chartered Bank ('Stand-Chart') and since this was insufficient to pay off the redemption sum he topped up the difference with his own funds. By 26 March 1991, the name of the first defendant was registered as proprietor of the property.

In September 1993, wishing to raise further funds for his own business expansion, the first defendant borrowed from the second defendant — a registered finance company — a sum of RM1,575,000, and as security for this loan, the property was charged to the second defendant by way of two legal charges. Part of this loan was used to redeem the property from Stand-Chart.

Upon discovering these facts, the plaintiff is now claiming:

(1) a declaration that the transfer from the father to the first defendant of the property is void under ss 47 and/or 52 of the Act;

(2) the charges created in favour of the second defendant are void under s 53B of the Act; A

(3) a declaration that the property is deemed to be the property of the plaintiff under s 53B(1) of the Act;

(4) alternatively, a declaration that the first defendant holds the property as a constructive trustee for the benefit of the plaintiff; B

(5) by virtue of ss 47 and 53B(2) of the Act and s 340(4) of the National Land Code 1965 ('the NLC 1965'), or otherwise, the plaintiff is entitled to recover the property free from the second defendant's charges;

(6) the defendants within 14 days do deliver the document of title of the said property, free from the second defendant's charges, failing which the senior assistant registrar of the High Court shall execute all relevant documents to transfer the property free from encumbrances to the plaintiff; C

(7) damages with interest; and D

(8) costs.

In short, the plaintiff wants back the property from the first defendant free from the encumbrances of the second defendant for the purpose of distributing it or the proceeds of it to the father's creditors under the law of bankruptcy. E

*Cause of action*

By the nature of this claim, two causes of action arise. The first is the 'relation back' action under s 47 of the Act to be read with s 3 of the same. This involves the first and second defendants. The second cause of action F concerns only the first defendant under s 53B(2) of the Act. As the second cause of action is more in the form of an alternative claim, it is only appropriate to deal with the first cause of action first.

*Causes of action under ss 24(1) and 47(1) of the Act* G

In order to consider the cause of action for relation back of the bankruptcy, pertinent sections of the Act need to be considered. The first is s 24(1) of the Act which provides that a person is adjudicated a bankrupt at the time when a receiving order is made against him. Upon this, 'his property shall become divisible among his creditors and shall vest in the Official Assignee' H under s 24(4) of the Act. However, by virtue of s 47(1) of the Act, a relation back of the bankruptcy can occur, for it provides:

> The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor, shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved I to have committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition.

A In brief, the first situation is where the bankruptcy relates back to the time when the act of bankruptcy was being committed on which a receiving order is made against him. However, and more relevant to our case is where there had been more than one act of bankruptcy committed, then the relation back is to the first of the acts of bankruptcy committed by the bankrupt within six months after the presentation of the bankruptcy petition.

B What then are the acts of bankruptcy committed in this case? Initially, the act of bankruptcy on which the bankruptcy petition was founded was the failure of the father to satisfy the judgment sum obtained against him by UMBC stated in the bankruptcy notice served on him on 29 May 1991. This act of bankruptcy falls within s 3(1)(i) of the Act. The other act of C bankruptcy which happened earlier and as claimed by the plaintiff is the transfer of the property to the first defendant which the plaintiff alleged was a fraudulent conveyance within s 3(1)(b) of the Act.

Section 3(1)(b) of the Act provides:

D
> A debtor commits an Act of bankruptcy in each of the following cases:
>
> (b) if in Malaysia or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof;

and according to s 2 of the Act, 'property' includes:

> ... land and every description of property whether real or personal ... .

E If it was a fraudulent conveyance, the transaction is void and the plaintiff should be entitled to the property under s 47 of the Act. Further, as the property is presently charged to the second defendant, by the doctrine of relation back, the plaintiff should also be entitled to recover the property free from the two legal charges even though the second defendant was not F party to any impropriety in its creation.

As time is of essence here, it is best to determine the exact period for consideration. The bankruptcy petition was presented on 15 August 1991 against the father. Six months preceding this date would land us with 16 February 1991. This means that the first act of bankruptcy, if there was more than one, must have been committed between 16 February 1991 and G 3 July 1992 (the date on which the father was adjudicated a bankrupt).

To determine this issue, the first thing to examine is whether the transfer by the father to the first defendant was fraudulent. As to what tantamounts to something being fraudulent, 4 *Halsbury's Laws* (4th Ed) at p 514 has this to contribute:

H
> The word 'fraudulent' has received ... with reference to the bankruptcy questions, a particular signification different from that in which it is ordinarily used (per Knight-Bruce VC in *Re Marshall, ex p Zwilchenbart* (1844) 3 Mont D & De G 671). There need not be more than a design to defeat or delay creditors, generally by some act which will prevent the distribution of the I insolvent debtor's property in accordance with the bankruptcy law (*Re Sinclair, ex p Chaplin* (1884) 26 Ch D 319; 53 LJ Ch 732).

A better guide seems to come from one of our own case law, *Re Khor Bak Kee* [1936] MLJ 5, decided on appeal by a powerful coram consisting of the Acting Chief Justice of the Straits Settlement, the Chief Justice of

the FMS and Howes J. The following passages of Thomas CJ (FMS) at pp 6–7 are significant: A

> In conveyances by bankrupts it is always necessary to consider the state of affairs at the time of the conveyance, the relationship of the respective parties, the sufficiency of the consideration, and in short all the surrounding circumstances. ... B
>
> In bankruptcy a particular significance has always been given to the word fraudulent. A conveyance which would not be fraudulent when the parties are solvent can be fraudulent in bankruptcy, because the interest of other creditors have not been observed.

In *Re Khor Bak Kee*, the bankrupt assigned to his wife his interest in a certain land for a consideration of RM100. The day after the conveyance had been executed, he closed his business and was adjudicated a bankrupt four months following. By this time, the wife had sold the property to a third party. The Court of Appeal upheld the decision of the trial judge in finding both the conveyances void, ie the first conveyance to the wife and the second by the wife to the third party. C D

Thirty years after *Re Khor Bak Kee*, Choor Singh J in the Singapore case of *Re Yeow Heap Seng* [1965] 2 MLJ 67 not only applied the same principle stated in *Re Khor Bak Kee*'s case but reiterated virtually the exact words uttered by Thomas CJ (FMS). To my mind, these are sound principles which should be applicable in the determination of our present case. E

*Preliminary issue (i)*

Before I proceed to analyse the facts with the established principles, it is necessary to settle two preliminary points raised by Mr Muker, counsel for the first defendant in his submission. The first concerns the standard of proof, which he was of the opinion should be one of beyond reasonable doubt as it involves upsetting the indefeasible title of the first defendant in the property under s 340 of the NLC 1965. He cited the case of *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 in support. But by the same token, Mr Muker was candid to tender a very recent judgment of the Federal Court in *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45, setting down the law to deal with such situations. In the enlightened judgment of Mohd Azmi FCJ, the following passage (at pp 59–60) will be sufficient to determine the present state of law applicable: F G

> From the wide definition of 'fraud' under s 17 of the Contracts Act 1950, as well as the leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation. In allowing the appeal in *Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21, the Federal Court reversed the judgment of the High Court on the finding of a civil fraud in a non- disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an H I

> agent. The fraud alleged was purely civil in nature and based on whether there was any personal consideration when the plaintiff entered into the contract, and on that basis the burden of proof was the civil burden. We agree with both counsel that to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law. But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud and not based on a criminal conduct or offence, the civil burden is applicable.

In our case, the allegation of a fraudulent conveyance is founded on the law of bankruptcy, which is a civil matter. The issue to be decided is whether the father had conveyed the property for the purpose of delaying or defeating and/or preventing the fair distribution in accordance with the Act. This has no connection with any criminal conduct or offence for the entire claim by its nature and the law applicable is civil in substance. Though the effect of the finding, if it is in the positive, will affect the title and interest of the property governed by the NLC 1965, the claim itself originates from a civil based matter. I am therefore of the view that the civil burden of proof based on the balance of probabilities is applicable here.

*Preliminary issue (ii)*

The second preliminary point relates to the date when the alleged act of bankruptcy by way of fraudulent conveyance occurred. The plaintiff relied on 26 March 1991, which is the date when the property was duly registered in the name of the first defendant. Mr Muker tendered 22 September 1990, which was the date when the sale and purchase agreement for the property was signed between the father and the first defendant. The significance of this argument is that if the fraudulent conveyance occurred on 22 September 1990, the six-month period for relation back commencing from 15 August 1991 (the date of the presentation of the creditor's petition) would not extend back beyond 16 February 1991 (six months from the presentation of the creditor's petition) to include this conveyance, even though it was fraudulent thereby escaping the tentacles of the Official Assignee under s 47 of the Act.

In my opinion 'fraudulent conveyance' under s 3(1)(b) of the Act connotes a positive action rather than the instrument of transfer of a property, or the document which evidences an agreement to transfer. It refers to an act of transfer where the title of the property of a person will by law be considered passed from one to another. This was indeed the position when the (then) Supreme Court in *Lian Keow Sdn Bhd (In liquidation) v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449, ruled that:

> ... transfer of the property was made when registered under the NLC 1965 and not when it was executed by the parties.

The transfer of the property to the first defendant took place on 26 March 1991, and by elementary arithmetic this was well within the period of six months preceding the date of the presentation of the bankruptcy petition against the father which was on 15 August 1991. Therefore, the alleged

fraudulent conveyance can still be considered for relation back under s 47 of the Act. A

*Was the transfer by the father to the first defendant fraudulent?*

Returning to the substantive issue, the first inescapable fact is that the relationship between the transferor and transferee of the property is that of father and son. Inevitably suspicion immediately arises as to whether the transaction is bona fide, particularly when the transferor was one so young at the material time. He was only 25 years of age, engaged as a manager in one of the family's four companies but drawing a salary of only RM3,000 per month. With this credential, he mounted a purchase on a property with a declared consideration of RM1m. Though this purchase was assisted by a bank borrowing of RM960,000 from Stand-Chart, he still had to expand a sum of RM249,732 of his own money to top up the difference between the redemption sum due to D & C Bank and the loan from Stand-Chart plus the initial RM100,000 paid to his father under the purported agreement. This certainly was an enormous amount and though he explained the source of this income was from shares and sale of shares of public-listed companies given to him by his mother, one still cannot overcome this suspicion by the surrounding circumstances that the entire family of the transacting parties was facing serious financial hardship at that time. Such doubts are further fuelled by the first defendant's purchase of another property just 1½ months earlier from the family company he was working for. This is the Sentul property with a declared consideration of RM600,000. To finance this purchase, a sum of RM560,000 was raised from Stand-Chart with the difference once again coming out of his own pocket. What strikes me is the close proximity of these transactions between each other as well as to the time when the family was facing severe financial hardship, the magnitude of the loans and the almost similar proprietors. B C D E F

The next factor to examine is the consideration in the sale and purchase agreement. The plaintiff argued that it was below market value while the first defendant insisted that it was fair and reasonable at the material time. Out of this encounter one pertinent point arose. Although the consideration agreed upon between the parties was RM1m, the first defendant actually paid a total of RM1,209,732, caused by the substantial redemption sum to D & C Bank. This makes the purchase price substantially higher than what the parties had bargained for. Despite this, what amazed me was the complete absence of protest from the first defendant to his father, either in the form of a demand for the return of the initial RM100,000 to set off the exceeded amount or to terminate the sale upon the discovery of a higher than agreed price. These are not unreasonable approaches in any arm's length transaction, since one hardly believes that a purchaser will voluntarily and readily pay a higher consideration than what was agreed upon. G H I

As for the market value of the property at that time, not dissimilar to other expert witnesses from other professions, the two qualified valuers arrived at different conclusions. The government valuer tagged it at RM1.9m while the private valuer was of the opinion that it would have fetched

RM1.4m. The fundamental difference, I believe, is the redevelopment potential which the private valuer omitted for consideration but included by his government counterpart. The former valued the property on a 'as is where is' basis without redevelopment consideration. Nevertheless, both valuers agreed that the property was in a favourable area of growth with a probable change in the density control. With these factors, I am convinced that the property is worth higher than the RM1m stated as consideration in the sale and purchase agreement.

The first defendant attempted to explain that the purpose of his purchase of the property was 'to help my father', since D & C Bank only offered to purchase the same property for RM750,000. I do not see the rationale of this explanation. Any useful help offered must not only lead to a settlement of the outstanding sum due to D & C Bank, but must also include those due to UMBC. It serves no purpose to settle only D & C Bank and leave UMBC to adjudicate the father a bankrupt. If this be the case, the first defendant may as well leave D & C Bank to foreclose on the property, and if there is any recourse against the father by D & C Bank for the shortfall in proceeds derived from the foreclosure sale, the bank can only join the line of creditors for distribution of the father's estate. This has little effect on the bankrupt father. To my mind, the theory of 'to help my father' is completely an eyewash; it is more like helping oneself or to help the father defeat the creditors.

The next consideration relates to the intention of the parties in this conveyance. The transferor is now dead and we are deprived of his testimony. The first defendant as transferee, by denying that he was possessed of knowledge that his father was in a dire financial situation at the material time, hoped to imply that the transfer was bona fide. On this, the circumstances prevailing at that time must be examined.

It is not a disputed fact that at the material time of the transfer of the property there were four judgments obtained against the father by UMBC, not counting the pressure applied by D & C Bank for repayment on the loan secured over the property. With this, it is obvious that he was encountering tremendous pressure from creditors. In an attempt to settle this matter, two letters of significance to this issue were written to UMBC. The first is dated 1 November 1988 by Kwang Hap Siang Sdn Bhd and it refers to a personal meeting between the representatives of UMBC and the company where the first defendant was present. The matters discussed were the outstanding loans due by the family's four companies to the said bank, followed by a request for director's guarantees to be varied under a proposed settlement. The second letter dated 27 January 1989 was a follow-up by the same company where it refers once again to director's guarantees. This letter was signed by the first defendant. From the contents of these two letters, it fortifies the fact that not only were the four family companies in financial trouble but also their directors as guarantors. With the physical presence of the first defendant at the meeting with UMBC officials and the contents of the second letter — all of which involved a negotiation to settle the financial predicament of the father and his family — it is hard to believe that the first defendant had no knowledge that his

father was facing monetary distress. Such overwhelming evidence makes the first defendant's attempt to explain that he knew nothing of the subject matter of the meeting mentioned in the first letter, and that he was unaware of the true nature of the contents in the second letter since he happened to be the only person around to sign it, mere conjectures devoid of any truth. To my mind, he was in the thick and thin of the affairs.

Judging from the conditions which the father and his family were in at the time, I find it very probable that the father transferred the property to the first defendant to ensure its safety from an impending financial disaster. The most appropriate person to safeguard it was the first defendant since he was the only male lineage who escaped the clutches of UMBC by not being a guarantor. With this, I therefore find that the transfer of the property from the father to the first defendant was a fraudulent conveyance constituting an act of bankruptcy within s 3(1)(b) of the Act. It is therefore void.

*The general effects of relation back*

Following from the above I shall now consider the effects of the doctrine of relation back on the second defendant and the provisions of the NLC 1965 affecting indefeasibility of title and interest. As submitted — indeed it was never challenged by the plaintiff during trial — the second defendant was bona fide in the loans granted to the first defendant over which the present two legal charges were registered over the said land. In presenting the case for the second defendant, Mr Darryl Goon, their counsel, firstly argued that the doctrine of relation back under s 47 of the Act applies only to chattel and not to landed property. Secondly, as the NLC 1965 is the supreme statutory enactment governing and administering all lands in Peninsular Malaysia, the second defendant's registered interest remains undefeated because the interest of the plaintiff has not been endorsed on the register of titles under s 349 of the NLC 1965.

The doctrine of relation back further than the original transferee are displayed in two English authorities (*Re A Gunsbourg & Co Ltd* [1920] All ER Rep 492 and *Dombrowski, Re Trustee* (1923) 92 LR Ch 415). In the former case, the facts were basically these. On 20 September 1917, the debtor transferred certain furniture to a company. On the even date he committed an act of bankruptcy and by 8 October 1917, a bankruptcy petition was presented against him. Soon thereafter, on 12 December 1917 he was adjudicated a bankrupt. On 3 February 1919, the transfer of the furniture by the bankrupt that took place on 20 September 1917 was declared fraudulent and void so as to be an act of bankruptcy to which the trustee in bankruptcy could relate back. By this time however, the furniture had been sold and resold three times, finally reaching the appellants in this case who were bona fide purchasers for valuable consideration without notice. By a majority decision, the Court of Appeal allowed the claim by the trustee of the bankrupt to succeed in securing the return of the furniture or its value. To elaborate on the rationale behind this approach, the following passage of Lord Sterndale MR at p 495 is sufficient:

A The trustee's title, however, accrues not by any order declaring transactions an act of bankruptcy, but by the operation of the statute as soon as the receiving order is made. If the trustee sued the person in possession of the bankrupt's property in trover or detinue he could succeed if he proved in that litigation that the transaction was an act of bankruptcy within the period of relation back, although no previous declaration had been obtained B from the court to that effect.

The question is: What is the effect of the relation back on these transactions? In my opinion, this is determined for me by authority. In *Re Pollitt, ex p Minor* [1893] 1 QB 455 Lord Esher MR stated the effect of the relation back. If this be correct the position is exactly the same as if the bankrupt has been in possession of goods belonging to another to which he C had no title and had sold them to the original transferee, who had then resold them. For such a case neither the original transferee would take any title at all, and the true owner could recover the goods from any one in whose possession he found them. I know of no doctrine of law or equity which would relieve any of the transferees in these circumstances.

D In *Dombrowski, Re Trustee* the trial judge in circumstances similar to those in *Re A Gunsbourg* adopted the same approach and granted the relevant orders for the goods held by subsequent bona fide purchasers for value without notice of the original fraudulent transfer to be returned to the bankrupt's estate.

E *The specific effect of relation back on the NLC 1965*

Indeed, the subject matter of *Gunsbourg* and *Dombrowski* involves a return of chattel, but for landed property Mr Goon argued that in Malaysia this cannot apply because of the existence of our NLC 1965 which sets out a procedure where the Official Assignee can only be vested with landed F property if the provision of s 349 is complied with. Section 349(3) of the NLC 1965 is specific when it declares that:

> No land, share or interest shall vest in the Official Assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.

G Therefore though the Official Assignee in this case may be vested with the bankrupt's property under s 24(4) of the Act, he is not vested in law with the bankrupt's landed property until the Registrar of Land Titles endorses a memorial of a transmission on the register document of title to the said land in accordance with s 349(1) and (2) of the NLC 1965. Since no H transmission had been affected on the register of title of the property, the registered interest of the second defendant remains indefeasible.

Of course, by this proposition there may seem to be a conflict of statutory provisions between ss 349(3) of the NLC 1965 and 24(4) of the Act. Mr Goon's suggested solution is to apply the maxim *generalia specialibus* I *non derogant* (general statements or provisions do not derogate from special statements or provisions) in their interpretation; the Act, although being a subsequent legislation to the NLC 1965, must give way to the prior NLC 1965 which is an enactment governing the primary subject matter of this case.

I am, however, not of this view. To my mind, the two enactments can co-exist and complement each other. Section 24(4) of the Act vests upon the Official Assignee the bankrupt's property upon bankruptcy. When it involves land, registration of his interest under s 349 of the NLC 1965 becomes necessary for the purpose of dealing with the land. In between this period of registering his interest with the Registrar of Land Titles and after he was vested with the bankrupt's property under s 24(4) of the Act, the land is vested in him in equity. This view of mine is not without support, as VC George J (as he then was) in *Re Kwan Chew Shen t/a Sykt Kaaf* [1987] 1 CLJ 314 was of the same opinion, expressed as follows:

> Having the Torrens system in particular s 349 of the NLC 1965 in mind, it is obvious that s 24(4) of the [Bankruptcy] Act should be read subject to the requirement of s 349, as far as land and interest in land is concerned. This is not to make for s 24(4) to be pointless. Section 24(4) of the [Bankruptcy] Act and s 349 of the NLC 1965 should be read as complementing each other. Section 24(4) in the context of the Torrens system has the effect that upon the adjudication of bankruptcy, land and interest in land belonging to the bankrupt vest in equity (and not in law) in the Official Assignee. It will only vest in the Official Assignee at law when the requirement of the law of registration as provided by s 349 have been met.

To me, this is a sound ruling and is the correct position of the law. The NLC 1965 is an enactment regulating dealings in land and for this it is indeed desirable that the entry of the Official Assignee's vested interest granted under the Act should also be registered. However, this does not mean that before such registration the vested interest of the Official Assignee in land should go unrecognized.

Recognizing the rights of the Official Assignee in the property, I shall now deal with the issue of indefeasibility of registered title and interest under s 340(1) of the NLC 1965. The defendants claimed that under the circumstances of this case the exceptions provided under s 340 of the NLC 1965 are inapplicable to defeat their registered title and interest. Mr Goon proceeded further by stressing firstly, that the second defendant's legal charges were created and registered when the first defendant was the registered proprietor without any notice at that time of any memorial endorsed on the title indicating the interest of the plaintiff as required under s 349(1) of the NLC 1965. Secondly, the second defendant which is within the category of 'purchaser in good faith and for valuable consideration' under s 340(3) of the NLC 1965 is exempted from having its registered interest under the NLC 1965 set aside. Mr Thomas, however, disagreed and argued that the combined two exceptions as set out under s 340(4) of the NLC 1965 are sufficient to annul the indefeasibility of the defendants' title and interest in the property.

On the first contention, it is necessary to remind ourselves of the primary objectives of the Torrens system, which David SY Wong in his book *Tenure & Land Dealings in Malay States* at p 322 described as:

> ... to facilitate dealings with the land, to simplify titles to the land and to secure the very title acquired by registration a quality of 'indefeasibility' — a shield of protection against attacks — subject only to limited exceptions.

A The limited exceptions commonly quoted are those of fraud, misrepresentation, forgery and insufficient and void instrument or where title or interest was unlawfully acquired — all spelled out under s 340(2) of the NLC 1965. However, there are two provisions found under s 340(4) of the NLC 1965 which provide that:

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> Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

C Not much authority has been decided on these 'exceptions', but Judith Sihombing in *National Land Code — A Commentary* (2nd Ed) is of the view that s 340(4)(a) of the NLC 1965 covers situations such as:

(1) forfeiture to state due to failure of payment;

D (2) forfeiture of registered interest such as a registered lease for breach of any agreement to which the lease is subject;

(3) the sale of the land or lease by a chargee consequent on the chargor's default;

(4) the avoidance of registration of an otherwise indefeasible title or interest due to its invalidity under other legislation; and

E

(5) the sale of land or interest pursuant to other legislation where the selling authority is so empowered to recover taxes or such imposts.

But on s 340(4)(b) of the NLC 1965, she seems to feel that 'the terms of this paragraph are rather ambiguous'. This however was not the view of F the Federal Court in their recent judgment of *Krishnadas a/l Achutan Nair v Maniyam a/l Samykano* [1997] 1 MLJ 94 where Gopal Sri Ram JCA expressed as follows at p 100:

> In our judgment, Parliament enacted s 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to
>
> G indefeasibility that appear in the second subsection to s 340 of the NLC 1965. While recognizing that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b), we cite, by way of illustration only, cases decided under the Moneylenders Act 1951.

H To my mind, the fact situation in our case is exactly what was envisaged by the framers of this provision. The word 'determination' used in s 340(4) of the NLC 1965 must connote the legal meaning of 'the cessation of an estate or interest' — *The Concise Oxford Dictionary*. When this court ruled that the conveyance between the father and the first

I defendant was fraudulent and therefore void, the title of the first defendant in the said property determined. When it determined, the concept of indefeasibility no longer applies by virtue of s 340(4) of the NLC 1965, and since it determined by reason of the transfer being void, it relates back to the time of the transfer. This means that the first defendant had no title

at any time to the property. When he had no title to the property, he could not have created the legal charges in favour of the second defendant since the legal charges subsisted on the strength of the first defendant's claim to the title. They too have no protection of indefeasibility offered under s 340(1) of the NLC 1965.

As regards the second contention of the second defendant being a purchaser in good faith and for valuable consideration, I find no merit for the reason that s 340(3) of the NLC 1965 only applies to situations stated in sub-s (2) of s 340 of the NLC 1965. It does not extend to s 340(4) of the NLC 1965.

*Alternative claim — void under s 52(1) of the Act*

The only matter left to be considered is the alternative claim by the plaintiff to declare void the transfer of the property from the father to the first defendant under s 52(1) of the Act. This section provides as follows:

> Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Official Assignee, and shall, if the settlor becomes bankrupt at any subsequent time within [five] years after the date of the settlement, be void against the Official Assignee, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

The plaintiff's contention under this provision was that the father had settled the property on the first defendant and the first defendant was never a 'purchaser'. To determine this issue, it is far easier to approach it by examining whether the first defendant was a 'purchaser' under s 52(1) of the Act. For what tantamounts to a 'purchaser' the following proposition of Jessel MR in *Re Pumfrey, ex p Hillman* (1878) 10 Ch D 622 is of assistance:

> I think that in this section the word 'purchaser' means a 'buyer' in the ordinary commercial sense, not a purchaser in the legal sense of the word. That this is so is made obvious by the use of the other word 'incumbrancer', for every incumbrancer is a 'purchaser' in the legal sense. The two words 'purchaser' and 'incumbrancer' are contrasted with each other. It is impossible to say that in any sense of the word a trustee for the settlor's wife and children is a 'buyer' of the settled property. The present case, therefore, falls, not within the exception, but within the provision of s 91, and the decision of the chief judge must be affirmed.

Based on the detailed analysis of the evidence elaborated on in the earlier part of this judgment leading to the finding of a fraudulent conveyance between the father and the first defendant, I am convinced that the first defendant could not have qualified as a 'purchaser' in the ordinary sense

of the word. The transaction between them was more like a 'wayang kulit' (shadow play) orchestrated by the father for the sole purpose of defeating his creditors. It was not an arm's length deal and the transaction was a show staged for the purpose of avoiding the property from falling into the hands of the trustee in bankruptcy. There was not even good faith, let alone valuable consideration in this conveyance.

The whole transaction in my opinion was a settlement by the father to the first defendant. There was no consideration passed and the loan obtained from Stand-Chart was to substitute that from D & C Bank. The difference between the redemption sum and the loan from Stand-Chart was probably paid by the father. The objective of this settlement, judging the evidence in its entirety, was to safeguard the property because it was worth more than the sum due to D & C Bank. For this, I therefore find that the plaintiff can also succeed in their alternative claim that the property is a settlement within the period stipulated in s 52(1) of the Act and thus the transfer to the first defendant was therefore void.

*Should the plaintiff take the property free from all 'encumbrances'?*

Now that the transfer of the property from the father to the first defendant as well as the legal charges have been declared void, the remaining issue to consider is whether the plaintiff will take the property free from 'encumbrance'. The 'encumbrance' I am referring to is not the two legal charges of the second defendant which have been declared void, but whether consideration should be given for the redemption sum paid over to D & C Bank. This arose from the consequence of relation back to the time before the father made the fraudulent conveyance to the first defendant. At that time, the property was charged to D & C Bank. As forwarded by Mr Muker, since the first defendant paid the redemption sum to D & C Bank, he should be credited for this sum by the plaintiff who takes the property upon the father being adjudicated a bankrupt. I am not inclined to this argument. Instead, I feel that the approach forwarded by Mr Thomas' argument was more appropriate. This is based on the exact legal position of the property just before the father made the fraudulent conveyance. The fraudulent conveyance was done on the date of the registration of the transfer. At this particular point of time, ie the exact moment when the name of the first defendant was inserted into the register of the property, the property must have been free of the D & C Bank charge, otherwise the transfer could not have been affected. Though in practice the discharge of charge and memorandum of transfer are normally presented together but for registration purposes, the discharge of charge must physically take place prior to the registration of transfer. Thus at the precise moment of the registration of the first defendant's name onto the register of title as proprietor, the property must have been free from the legal charge of D & C Bank, and it must be deemed that the father had secured such a discharge. Under such circumstances, the plaintiff is entitled to take the property free from all encumbrances.

*Orders*

By reasons aforesaid I hereby allow:

(1) a declaration that the transfer of the property from the father to the first defendant is void as against the plaintiff pursuant to ss 47 and/or 52 of the Act;

(2) a declaration that the two legal charges of the second defendant are void as against the plaintiff;

(3) a declaration that the property is vested by way of equity in the plaintiff;

(4) a declaration that by virtue of the provisions of ss 47 and 53B(2) of the Act and s 340(4) of the NLC 1965, the plaintiff is entitled to recover the property from the first defendant free from the two legal charges of the second defendant;

(5) a declaration that the first and/or second defendants do deliver the issued document of title of the said property together with all other relevant and related documents to the plaintiff within 14 days from date of this order to give full effect to this judgment;

(6) a declaration that that the Registrar of Titles of the said property delete and cancel the title and interest of the first and second defendants respectively in the register document of title;

(7) a declaration that the Registrar of Titles shall, upon this order, register the plaintiff's name in the register document of title of the said property by endorsing a memorial of this transmission;

(8) a declaration where necessary to give full effect to this judgment that the senior assistant registrar of the High Court be authorized to execute all relevant documents pertaining to transfer the property to the plaintiff; and

(9) a declaration that costs to be paid by the first and second defendants to the plaintiff.

*Order accordingly.*

Reported by Kenneth Goh